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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 455.

FREDERICK S. DEITRICK, Receiver of the Boston-Continental National Bank, *et al., Petitioners,*

v.

STANDARD SURETY & CASUALTY CO. OF NEW YORK, *Respondent.*

(And Six Other Actions Consolidated Therewith)

PETITION FOR REHEARING.

ROBERT E. GOODWIN,
RICHARD M. NICHOLS,
Attorneys for Petitioners.

GEORGE P. BARSE,
JAMES LOUIS ROBERTSON,
TREVOR V. ROBERTS,
Attorneys for the Comptroller of the Currency, Of Counsel.

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STANDARD SURETY & CASUALTY CO. OF NEW YORK, *Respondent.*
(And Six Other Actions Consolidated Therewith)

PETITION FOR REHEARING.

Come now Frederick S. Deitrick, Receiver of the Boston-Continental National Bank, *et al.*, petitioners in the above entitled cause, and request a rehearing, or, in the alternative, a modification of the opinion by this Court in said cause rendered, and in support thereof respectfully show:

1. In the next to the last paragraph of the majority opinion it is stated:

> "An examination of the pleadings makes it quite clear that the Receiver undertook to set up rights acquired by the insolvent bank through duly executed

contracts between it and the Surety Company. *He makes no suggestion of a purpose attributable to the company to mislead creditors or others;* makes no allegations of damage except that sustained by the bank. *He sets up no facts which would render unconscionable a denial of liability upon the bond because of the agent's fraud* obviously induced by the president of the bank. In this state of the pleadings the Receiver may not have judgment; he cannot rely on something not complained of, nor can he have damages because of supposed deceptions which the pleadings fail to suggest." (Italics inserted)

On page 6 of the majority opinion it is stated:

"By stipulation the causes were joined for appeal upon a single record. The Circuit Court of Appeals affirmed the District Court and said: 'The master and auditor held that the receiver in bringing these actions did not derive his right of recovery through the Bank, but because one or more creditors of the Bank were deceived, and as he represents creditors he derived his right of action through them. The receiver, however, makes no such allegations in his declaration'. 'It is clear from the pleadings that the receiver seeks to recover on these bonds as assets of the Bank. In such an action he stands no better than the Bank itself. All defenses open against the Bank in such a case are open against the receiver, and he is chargeable with knowledge of all facts known to the bank affecting the character of the claim.' 'If therefore, the contract with the Surety Company was illegal as to the Bank, because, as the master and auditor found the Bank was charged with the knowledge of its president, a recovery based on the contract of surety cannot be had by the receiver since a recovery must be based on the pleadings, and the allegations of liability in the plaintiff's declarations are based solely on the contract of surety.' In respect of the Receiver's counterclaim set up in the equity suits it said: 'The plaintiff's counterclaim distinctly raises the question of the validity of the bonds. The issue of trust for the benefit of creditors is not raised or suggested.' 'The obligations of the Surety Company based on the depositors of the bank being in-

jured by the giving of the bonds, and the receiver's claim against the Surety Company based on a trust relationship are not mentioned, and, we think, are not raised by the plaintiff's counterclaim in the equity suits'."

In connection with the foregoing, petitioners submit:

(a) If the doctrine is to be adopted in this case that notice to Ragon, the president of the bank, is to be imputed to the bank, so that his notice becomes the bank's notice, would it not logically follow by that same doctrine that the notice of Cliff, as agent of the Surety Company, must likewise be imputed to his principal, the Surety Company?

Assuming this to be sound, the situation so far as the Surety Company is concerned, would seem to be the same as if the Surety Company had intentionally and purposely conspired with the president of the bank to deceive:

(1) The bank,

(2) The directors of the bank,

(3) The bank examiners and the Comptroller of the Currency.

(4) Indirectly and derivatively, the existing and future depositors of the bank.

Disregarding for the moment the questions of pleading, and looking solely to substance, may it not properly be urged that under these circumstances the Surety Company is estopped from setting up the defenses of lack of consideration, lack of authority, and fraud of its agent, as against the depositors and other creditors of the bank who must necessarily be held to have been intended to be protected by the supervisory and administrative functions required to be exercised by the Comptroller of the Currency and his bank examiners. By reason of imputation of notice to the surety may it not be said that the situation of the surety in this respect is the same as though an individual surety

or natural person, rather than the corporate surety had conspired with the president of the bank to perpetrate this fraud upon the bank examiners and the Comptroller of the Currency and indirectly and ultimately upon the depositors and other creditors of the bank? Would an individual surety or natural person under such circumstances be permitted to set up his own fraud and conspiracy to defeat the obligation thus given by him when sued upon that very obligation by the receiver of the insolvent bank?

Certainly it would seem that such an individual surety would not be permitted to prevail. Certainly also, it would seem that if an individual surety would not be permitted to prevail by setting up such defenses, a corporate surety should not be permitted to prevail where it is chargeable by law with the notice possessed by the *sole agent* (in this case, Cliff) who was acting *for it* in the transaction in question.

Attention in this connection, in the light of the foregoing, is again respectfully directed to the doctrines relating to estoppel, established by the many cases refered to on pages 35-48 of petitioners' main brief, particularly as enunciated in the case of *Iglehart* v. *Todd*, 203 Ind. 427, quoted from page 42 of petitioners' brief, wherein it is pointed out that tne banking business is one of public concern, regulated and examined by the supervisory authorities, and that the action of those who participate in a transaction by which the assets of a bank are given a favorable appearance for the purpose of examination,

> "is fraudulent as to the public, and as to the creditors and depositors, in whose behalf the regulation of banks is imposed, * * *."

The case asserts the further doctrines that:

> " 'Where one by giving accommodation notes is instrumental in clothing a bank with such an appearance of genuine assets as induces a bank examiner to regard it as sound, and to permit it to continue in busi-

> ness, and where in its published reports such person's notes figured as resources, and the public relies thereon and intrusts the bank with its money, the maker of the note is estopped, as against the creditors, to say that his notes were other than what on their face they purported to be, or that the appearance which was given to the books of the bank was not genuine. * * *."

If it be sound doctrine that the maker of an accommodation note, given to deceive the bank examiners and to create an appearance of sound assets, is estopped in an action brought by the receiver of the bank upon those very notes, surely by analogy, an estoppel would likewise rise against one who executed surety or guaranty bonds to create an appearance of soundness of notes or other assets of the bank to which they were either physically attached or otherwise identified or allocated.

(b) As to the matter of pleading:

(1) Was it necessary that the receiver should have expressly averred that he represented the depositors when that function is imposed upon him as a matter of law and when his action in the premises could only be on behalf of and as the representative of the depositors? The guaranty bonds were sued upon as assets of the receivership, and the suit, of course, was manifestly for the benefit of the depositors. The estoppel was relied upon by the receiver,—based upon the evidence,—to rebut or overcome the defense of the Surety Company to the bonds. The suit in this respect was entirely different from any individual action which a depositor might have had *in his own right*, against some officer of the bank for fraud specifically and directly practised upon him by way of misrepresentations as to the solvency of the bank upon which the depositor had relied in placing his funds in the bank. The receiver was not representing the depositors in that kind of action.

(2) Having in mind that the Surety Company filed bills in equity to set aside and cancel the guaranty bonds, attention

is directed to numbered paragraph 4 of the bill of complaint, quoted on page 4 of the majority opinion. Therein it will be observed that the Surety Company set up the fact that the bonds were executed by Cliff without consideration, and upon the understanding that they would not be binding obligations of the Surety Company and that the Surety Company would not be informed as to the existence of the bonds.

Was this not sufficient as a matter of pleading to support the evidence relating to the fact of conspiracy between Ragon and Cliff, and is it not clear that the Surety Company intended to rely upon it as a basis for cancellation of the bonds? If so would the receiver not be entitled, upon such evidence being adduced, to contend, *as a matter of law*, that assuming such facts to be true, those very facts constituted estoppel against the Surety Company? Upon such evidence being produced would the receiver, then and there at the trial table, have to first amend his pleadings before he could assert such estoppel as a matter of law? It would seem clear under settled practise, that in this situation the receiver could assert the estoppel without necessity for amendment of the pleadings. In view of the fact that the law actions and the equity actions were consolidated, certainly the pleadings in the equity actions must be considered as well as the pleadings in the law actions.

Under these circumstances it seems to be settled that estoppel in pais may be relied upon without previous averments to that effect in the pleadings. (See page 12 of petitioners' reply brief and page 70 of petitioners' main brief.)

II. On page 7 of the majority opinion the following reference is made to the case of *Rankin* v. *City National Bank*:

> "In Rankin v. City National Bank, 208 U. S. 541, 545, 546, a suit by the receiver of the Capitol National Bank of Guthrie to recover the amount of an alleged deposit where it appeared 'that the whole business, from beginning to end, was and was intended to be a mere juggle with books and papers to deceive the bank examiner,' this Court denied the receiver's claim and said: '*If the*

Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank.' We adhere to the doctrine there approved and regard it as decisive of the present cause.'' (Italics inserted.)

It is submitted that the italicized portion of the quotation was dictum, and was not necessary to the decision of the case. However, assuming that it was not dictum, it would seem that the doctrine therein stated was in principle overruled by the later cases of *Texas and Pacific Railway Co.* v. *Pottorff, Receiver,* 291 U. S., 245 and the companion case of *City of Marion* v. *Sneeden, Receiver,* 291 U. S., 262, wherein it was held that the receiver did have a better right than the bank, and could recover on behalf of the depositors, even if it be assumed that the bank itself could not recover. To the same effect, by analogous principle, is *McCandless* v. *Furlaud,* 296 U. S., 140.

It would certainly seem to be a serious impairment of the effectiveness of the administrative and supervisory functions intended by Congress to be exercised with reference to national banks for the protection not only of these banks as Federal instrumentalities, but also of the depositors and other creditors who deal with them, to hold that where deceit and fraud has been practised upon the bank examiners and the bank afterwards goes into receivership, the receiver cannot recover upon the assets in the bank which were given the appearance of soundness as the direct result of the deceit so practised, and that the reason that such recovery cannot be made is that the notice of the deception and fraud so practised is imputed to the bank and consequently that the receiver has no greater right on behalf of the creditors in that respect that the bank itself would have had. Such appears, in effect, to be the doctrine established by the above quoted paragraph from page 7 of the opinion.

III.

CONCLUSION.

Petitioners respectfully but very earnestly urge that in view of the importance of the questions involved in this case, and in view of the considerations and distinctions hereinabove discussed, an opportunity be afforded for reargument and that reconsideration be given to the facts, the pleadings and the principles involved.

Counsel have withheld until almost the last moment the filing of this petition because of hesitancy in further adding to the burden of the court by the filing of a request for reargument and the consideration of it by the court necessarily thereby involved. However, counsel believe it their duty to again present the matter because they consider the issues involved to be of substantial public importance in the administration of the national banking system.

Respectfully submitted,

ROBERT E. GOODWIN,
RICHARD M. NICHOLS,
Attorneys for Petitioners.

GEORGE P. BARSE,
JAMES LOUIS ROBERTSON,
TREVOR V. ROBERTS,
Attorneys for the Comptroller of the Currency,
Of Counsel.

CERTIFICATE OF COUNSEL.

I, George P. Barse, of counsel for the Receiver of the Boston-Continental National Bank and as counsel for the Comptroller of the Currency under whose supervision the said insolvent national bank is being liquidated, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

GEORGE P. BARSE.

SUPREME COURT OF THE UNITED STATES.

No. 455.—October Term, 1937.

Frederick S. Deitrick, Receiver of the Boston-Continental Bank, et al., Petitioners, *vs.* Standard Surety & Casualty Co. of New York.	Certiorari to the United States Circuit Court of Appeals for the First Circuit

[March 28, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

The Boston-Continental National Bank, established in December 1930 through consolidation of Boston National Bank and Continental National Bank, became insolvent. December 17, 1931, a receiver appointed by the Comptroller of the Currency took charge of its affairs. Petitioner is his successor. Among the bank's effects were four "Note-Guaranty" Bonds—$40,000, $52,000, $20,000 and $20,000—alike in form, dated in August and December 1930 and June and July 1931, with certain "endorsements" showing extensions. Each purported to be executed by the maker of a described note as principal with Respondent as surety, and was conditioned to pay to the bank the amount of the note upon default, &c.

In June and September 1932 the Receiver brought separate actions at law upon three of these bonds. In each he alleged that the Company was indebted to him for the specified penalty with interest; and for this he asked judgment. The three declarations are alike in form and allegations. One, typical of all, is copied below.[1] There also is one of the Note-Guaranty Bonds,

[1] Declaration.

Now comes the plaintiff in the above-entitled action and says that on December 22, 1931, he was appointed receiver of Boston-Continental National Bank by the Comptroller of the Currency of the United States, that he duly qualified and is now acting as such receiver.

And the plaintiff says that the defendant duly entered into, executed under seal and delivered to the Continental National Bank of Boston, now known as Boston-Continental National Bank, a written instrument or bond, copy where-

typical of all.[2] Each declaration exhibited a bond, alleged that thereby the Company bound itself to pay the bank a specified sum

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of is hereto annexed marked "A" and hereby made a part hereof; that by the terms of said bond the defendant bound itself to pay said Continental National Bank of Boston the sum of forty thousand dollars ($40,000) in the event that four notes of ten thousand dollars ($10,000) each signed by Westchester Discount Corporation were not paid upon the due dates as set forth in said bond, the last due date being April 20, 1931; that some time prior to April 20, 1931, said bond was extended to June 20, 1931, by a written instrument called endorsement, copy whereof is hereto annexed marked "B"; that some time prior to June 20, 1931 said bond was extended to December 20, 1931 by a written instrument called endorsement, copy whereof is hereto annexed marked "C"; that the condition of said bond as extended as aforesaid has been broken in that Westchester Discount Corporation, the principal named therein, has not paid the notes described in said bonds according to their terms, but on the contrary has failed, refused and declined to pay said notes and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle the plaintiff to payment in full of said notes; that the defendant was duly notified of the default in accordance with the provisions of the bond; that the damages sustained by the plaintiff on account of the default of said Westchester Discount Corporation are in excess of forty thousand dollars ($40,000).

Wherefore, the defendant is indebted to the plaintiff in the penal sum of said bond with interest from December 20, 1931.

And the plaintiff says that this is an action at law arising under the Constitution and laws of the United States and is a case for winding up the affairs of said Boston-Continental National Bank; and the District Court of the United States for the District of Massachusetts has original jurisdiction under Section 24 of the Judicial Code of the United States.

(Signed) By his Attorneys, ————————,

————————.

[2] Copy of Bond.

No. $40,000,00

Know all Men by these Presents, That we, Westchester Discount Corporation of Mount Vernon, New York, as Principal, and the Standard Surety & Casualty Company of New York, a corporation organized and existing under the laws of the State of New York and having an usual place of business in Boston as Surety, are held and firmly bound and obliged unto the Continental National Bank of Boston, a banking corporation duly organized under the laws of the Commonwealth of Massachusetts and having an usual place of business in Boston in the County of Suffolk, in the full and just sum of forty thousand dollars ($40,000.) to be paid to said Continental National Bank of Boston as hereinafter provided to which payment we bind ourselves, our heirs, executors, administrators firmly by these presents. The condition of this obligation is such that if the said Westchester Discount Corporation shall upon the due dates as hereinafter indicated make to the Continental National Bank of Boston full and true payment of a schedule of four notes as listed below then this obligation shall be void, otherwise shall remain in full force and effect.

Schedule of Notes.

Date	Amount	Maturity
Dec. 20, 1930	$10,000.00	January 20, 1931
Dec. 20, 1930	10,000.00	February 20, 1931
Dec. 20, 1930	10,000.00	March 20, 1931
Dec. 26, 1930	10,000.00	April 20, 1931

In the event of default on the part of the principal on any note the obligee shall notify the home office of the Surety Company at 80 John Street, New

in the event of default, which had occurred, &c., that damages had been sustained whereby the surety had become indebted "in the penal sum of said bond, with interest".

Answering, the Company denied liability and alleged that, as the bank well knew, the bond was executed without authority, had been fraudulently obtained, was invalid.

Before the three law actions were filed the Surety Company instituted four separate equitable proceedings in the Supreme Court, Suffolk County, Massachusetts, against the bank and makers of guaranteed notes. Each complaint alleged that the bank had fraudulently obtained the bond and asked that it be declared null and void. Later the Receiver became party in these causes and all were removed to the federal court. There, he filed separate answers, substantially alike, averring that the bond had been duly executed, that default had taken place and that damages amounting to the full amount of the specified penalty had been sustained. Each answer concluded—"Wherefore these defendants pray: 1. That the court determine the amount due from the plaintiff to Boston-Continental Bank and John B. Cunningham, its receiver, and order the plaintiff to pay the same with interest. 2. For such further relief as the court finds meet and just."

Copies of one complaint[3] and answer[4] thereto, typical of all, are in the margin.

York City, New York, within ten (10) days by registered mail, of such default, and the Surety Company shall pay any liability hereunder, not exceeding the amount still unpaid on any or all of the aforesaid notes and in no event exceeding forty thousand dollars ($40,000.), said payment to be made by the Surety within thirty days after maturity of the final note.

Witness our hands and seals, and dated this 20th day of December A. D. 1930.

WESTCHESTER DISCOUNT CORPORATION, (SEAL)
By Joseph Stone, Treas.
STANDARD SURETY & CASUALTY COMPANY OF NEW YORK
By Percy G. Cliff, Attorney-in-Fact.

[3] Bill of Complaint.

1. The plaintiff is a corporation legally established and existing under the laws of the State of New York, having a usual place of business in Boston in the County of Suffolk in this Commonwealth.

2. The defendant Boston-Continental National Bank formerly called Continental National Bank of Boston, is a national bank association, legally established and existing under the laws of the United States of America, having its usual place of business in said Boston. The defendant Westchester Discount Corporation is a corporation established and existing under the laws of the State of New York having its usual place of business in Mount Vernon in the County of Westchester and State of New York.

3. The plaintiff is informed and believes and therefore avers that on or about December 20th, A. D. 1930 the defendant Westchester Discount Cor-

A jury was waived in the law actions and the seven causes went to an Auditor and Master with instructions to report findings of fact and conclusions of law, the former to be final. After taking

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poration and one Percy G. Cliff executed an instrument a copy of which is hereto annexed marked A and made a part hereof, and at the same time the defendant bank executed and delivered to said Cliff an instrument entitled "Release" a copy of which is hereto annexed Marked B and made a part hereof.

Thereafter, so the plaintiff is informed and believes and therefore avers, the said Cliff executed the instruments entitled "Endorsements" copies of which marked respectively C. and D. are hereto annexed and made parts hereof.

4. The plaintiff is informed and believes and therefore avers that all of the instruments aforesaid marked A. C. and D. were executed by said Cliff at the request and solicitation of the defendants without any consideration or security, without premium charged or paid or intended to be charged or paid therefor, upon the understanding between the defendants and said Cliff that said instruments were not binding obligations of the plaintiff, and upon the assurance and promise given by the defendants to said Cliff and upon the understanding that said instruments would not be used or enforced by said bank against the plaintiff, that the plaintiff should never be informed of the existence thereof, and that after remaining in the custody of the defendant bank for a short time they should be returned to said Cliff.

5. All of the instruments above described copies of which are hereto annexed marked A. C. and D. were executed by the said Cliff without authority from the plaintiff and without its knowledge or consent, as both defendants well knew. The plaintiff has only recently learned of the existence of said instruments which are now in the possession of the defendant bank.

Wherefore the plaintiff prays:

1. That the defendants be enjoined from enforcing or attempting to enforce the said instruments marked A. C. and D. or any of them by suit or otherwise.

2. That the said instruments marked A. C. and D. be declared null and void and that the defendant bank be ordered to deliver them up to be cancelled.

3. For such other and further relief as may be necessary and proper.

(Signed) By its Attorney, _____,

_____.

ANSWER OF BOSTON-CONTINENTAL NATIONAL BANK AND JOHN B. CUNNINGHAM, RECEIVER OF BOSTON-CONTINENTAL NATIONAL BANK.

Now comes Boston Continental National Bank and John B. Cunningham, receiver of Boston-Continental National Bank, and for answer to the plaintiff's bill of complaint says as follows:

1. They admit the allegations contained in the first paragraph of the bill of complaint.

2. They admit the allegations contained in the second paragraph of the bill of complaint.

3. As to the allegations contained in the third paragraph of the bill of complaint, they say that the instrument, a copy whereof is attached to the bill of complaint marked "A", was duly executed by Westchester Discount Corporation by Joseph Stone, its treasurer, and was duly executed by the plaintiff, by Percy G. Cliff, its attorney-in-fact, and that an attested copy of said Cliff's general power of attorney was attached to the original instrument; that thereafter the plaintiff duly executed the instruments entitled "Endorsements" by said Cliff, its attorney-in-fact, copies of which endorsements are attached to the bill of complaint marked "C" and "D"; that if a purported release was delivered to said Cliff by Continental National Bank by

much evidence he reported with a finding of facts showing clearly that the bank obtained the bonds through the fraud of its president, Ragan, and Cliff, general agent of the Company. Among other things he said: "I rule that the bonds and 'endorsements' in suit were not binding obligations in the hands of the bank as a going concern, for the reason that Ragan's knowledge of their infirmities is imputed to the bank; and that the bonds and 'endorsements' would not be binding obligations in the hands of the receiver, if his rights were derived solely from the bank as distinguished from its creditors." He further ruled that as Cliff, general agent of the Surety Company, knew the bonds would be shown to the bank directors and to any others entitled to inquire concerning the notes described therein for the purpose of deception, therefore "the bonds and 'endorsements' in suit are binding obligations in the hands of the receiver due to the fact that he represents the bank's creditors".

The District Court heard the causes on report and exceptions. It held the bonds void and further "adjudged and decreed that the counterclaim of the defendant receiver, set forth in his answer, be and the same is hereby dismissed".

Terrell M. Ragan in the form attached to the bill of complaint marked "B", such purported release was delivered without authority of the board of directors of said Continental National Bank, was executed without consideration and is voidable and void. Except as aforesaid, they deny the allegations contained in said paragraph 3 of the bill of complaint.

4. They deny the allegations contained in the fourth paragraph of the bill of complaint.

5. They deny the allegations contained in the fifth paragraph of the bill of complaint.

6. Further answering they say that the condition of said instrument, copy of which is attached to the bill of complaint marked "A" as extended by instruments, copies of which are attached to the bill of complaint marked "C" and "D", has been broken in that Westchester Discount Corporation, the principal named in said instrument, has not paid the notes described therein according to their terms, but on the contrary has failed, refused and declined to pay said notes and still continues so to refuse, notwithstanding the fact that all times have elapsed and all conditions have been fulfilled necessary to entitle Boston-Continental National Bank and John B. Cunningham, receiver of said bank, the successors to the obligee described therein, to payment in full of said notes; that the plaintiff was duly notified of the default in accordance with the provisions of said instrument; that the damages sustained by these defendants on account of the default of said Westchester Discount Corporation are in excess of $40,000.

Wherefore these defendants pray:

1. That the court determine the amount due from the plaintiff to Boston-Continental National Bank and John B. Cunningham, its receiver, and order the plaintiff to pay the same with interest.

2. For such further relief as the court finds meet and just.

(Signed) By its Attorney, ————————,

————————.

By stipulation the causes were joined for appeal upon a single record. The Circuit Court of Appeals affirmed the District Court and said: "The master and auditor held that the receiver in bringing these actions did not derive his right of recovery through the Bank, but because one or more creditors of the Bank were deceived, and as he represents creditors he derived his right of action through them. The receiver, however, makes no such allegations in his declaration". "It is clear from the pleadings that the receiver seeks to recover on these bonds as assets of the Bank. In such an action he stands no better than the Bank itself. All defenses open against the Bank in such a case are open against the receiver, and he is chargeable with knowledge of all facts known to the bank affecting the character of the claim." "If therefore, the contract with the Surety Company was illegal as to the Bank, because, as the master and auditor found the Bank was charged with the knowledge of its president, a recovery based on the contract of surety cannot be had by the receiver, since a recovery must be based on the pleadings, and the allegations of liability in the plaintiff's declarations are based solely on the contract of surety." In respect of the Receiver's counterclaim set up in the equity suits it said: "The plaintiff's counterclaim distinctly raises the question of the validity of the bonds. The issue of trust for the benefit of creditors is not raised or suggested." "The obligations of the Surety Company based on the depositors of the bank being injured by the giving of the bonds, and the receiver's claim against the Surety Company based on a trust relationship are not mentioned, and, we think, are not raised by the plaintiff's counterclaim in the equity suits."

We agree with the conclusion reached by the Circuit Court of Appeals. Its judgment must be affirmed.

Counsel for the Petitioner here submit—"The Receiver's position rests primarily upon the proposition that the circumstances surrounding the giving of the note-guaranty bonds by Cliff to the Bank accompanied by the supporting powers of attorney, . . . and the consequences which followed the credence given to said bonds and powers of attorney by the national bank examiners and the Comptroller, acting as the representatives of the depositors and other creditors, give rise, in a suit by the Receiver to enforce the bonds, to an estoppel which precludes the Surety Company from denying the validity of the bonds and from asserting as a defense

that its agent acted fraudulently and without authority in executing the bonds and that a fraudulent official of the Bank knew of the agent's misconduct."

An examination of the pleadings makes it quite clear that the Receiver undertook to set up rights acquired by the insolvent bank through duly executed contracts between it and the Surety Company. He makes no suggestion of a purpose attributable to the company to mislead creditors or others; makes no allegations of damage except that sustained by the bank. He sets up no facts which would render unconscionable a denial of liability upon the bond because of the agent's fraud obviously induced by the president of the bank. In this state of the pleadings the Receiver may not have judgment; he cannot rely on something not complained of, nor can he have damages because of supposed deceptions which the pleadings fail to suggest.

In *Rankin* v. *City National Bank*, 208 U. S. 541, 545, 546, a suit by the receiver of the Capitol National Bank of Guthrie to recover the amount of an alleged deposit where it appeared "that the whole business, from beginning to end, was and was intended to be a mere juggle with books and papers to deceive the bank examiner", this Court denied the receiver's claim and said: "If the Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank". We adhere to the doctrine there approved and regard it as decisive of the present cause.

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 455.—October Term, 1937.

Frederick S. Deitrick, Receiver of the Boston-Continental Bank, et al., Petitioners,
vs.
Standard Surety & Casualty Co. of New York.

Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[March 28, 1938.]

Mr. Justice Black, dissenting.

When two or more persons have jointly perpetrated a fraud with intent to injure others, justice and law combine to entitle injured parties to recover from any or all of the conspirators. Corporations can act only through agents. When, as here, two corporations, acting through authorized agents, have jointly perpetrated a fraud which was intended to—and did—injure others, a just rule of law should likewise hold both corporations jointly and severally responsible for the damages inflicted by them upon innocent parties.

In this case innocent depositors and other creditors of a now insolvent national bank suffered damages as a direct result of fraud wilfully perpetrated on them by joint action of the bank and the respondent surety corporation, acting through their agents. Because of the guilty participation of the bank president in this fraud, the opinion just read denies the receiver of the insolvent bank a recovery which would inure to the benefit of the innocent depositors. At the same time, however, the respondent surety corporation is freed from any responsibility to these innocent parties, in spite of the admitted guilty participation of its agent. That the agent of the respondent surety corporation was authorized to write the indemnity bonds used in the fraud is disclosed by the findings of the master and auditor—acting "under a stipulation that findings of fact shall be final." These findings show that:

The duly licensed agent of the surety company (respondent) conspired with the president of the bank to supply indemnity

bonds guaranteeing the payment of certain notes held by the bank, which bonds were to be placed among the assets of the bank for the purpose of deceiving Federal bank examiners, the bank's directors and all others entitled to inquire as to the soundness of the notes; the surety company's agent also personally assured the examiners that the bonds were all right; no premium was paid the surety company and the bonds were intended by the respondent's duly authorized agent and the president of the bank to be valueless and used as "window dressings" to accomplish deceptions; respondent's duly licensed agent had a power of attorney "to make, execute and deliver . . . for and on its behalf as surety, any and all bonds . . . undertakings, or anything in the nature of any of them, . . . to all intents and purposes as if same had been duly executed and acknowledged by the regularly elected officers of the company . . . ;" a copy of the power of attorney was attached to the bonds and the examiners inspected public records and verified the authenticity of this power of attorney; these bonds were executed after the examiners had notified the bank to make good an impairment of capital and the execution of these bonds caused the comptroller to withdraw his order to make good the impairment and as a result the bank continued to remain open, assumed additional obligations, and accepted further deposits in large amounts.

Since the receiver represents the creditors as well as the bank[1] he can sue in his own name to recover assets on behalf of the bank or its creditors.[2] "It is the duty of the receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for the general creditors, even though the corporation itself was not in a position to do so." *Texas and Pacific Railway* v. *Pottorff*, 291 U. S. 245, 261. There is no occasion to consider whether the bank could recover against the insurance company on the indemnity bonds. "Enough that the receiver has the requisite capacity." *McCandless* v. *Furlaud*, 296 U. S. 140, 160. In the *McCandless* case (page 171), the minority view was that "the receiver's rights could rise no higher" than the corporation's rights. The majority rejected this viewpoint (page 159), holding that where corporate officers and shareholders combined with others to despoil a corporation, recovery

[1] Case *v.* Terrel, 11 Wall. 199, 202; High, "On Receivers", 4th Ed., Sections 314, 320; In re Pleasant Hill Lbr. Co., 126 Louisiana 743, 757; Duke *v.* Stayton Co., 132 Washington 69, 77; Atlantic Trust Co. *v.* Dana, 128 Fed. 209, 221; De Stafano *v.* Almond Co., 107 N. J. Equity 156, 159; Industrial Mut. Dep. Co.'s Receiver *v.* Taylor, 118 Kentucky 851, 854; Iglehart *v.* Todd, 203 Ind. 427, 440.

[2] See, Kennedy *v.* Gibson and others, 75 U. S. 498, 506.

could be had "either by the creditors directly or in their behalf by a receiver."

The receiver does not merely represent the corporation — the bank. The object of the appointment of a receiver is to collect and protect all of the insolvent's assets in the interest of the creditors first, then for the benefit of the stockholders. It has long been recognized that even in the case of a going bank the rights of depositors and the public would be jeopardized unless given protection in addition to that afforded by the bank's officers elected by the stockholders. For that reason, among others, the government has provided a system of examination for all national banks.[3] Statutes require banks to make reports to the Comptroller of the Currency and to permit examinations by Federal bank examiners. These examinations are designed to prevent such frauds as were perpetrated in this case. This objective will be frustrated if surety companies—with complete immunity—can, through their authorized agents, conspire with bank officials to deceive and trick bank examiners. The convenient fiction that knowledge of an officer of the bank is imputed to the bank itself is not sufficient to relieve respondent surety company from the consequences of the wrong committed by its authorized agent. There is not even a fiction under which knowledge can be imputed to innocent depositors. Strange, indeed, it is if the elaborate system of precautions provided by the government to protect the interests of creditors of national banks by examination and visitation of Federal officials must be held for naught by application of the fiction that the bank —not the injured depositors—knew everything its president knew. The interests of the bank and the interests of the depositors and creditors are not always identical. That their interests are recognized as separate and distinguishable is amply shown by laws passed to protect depositors and creditors of national banks. Public solicitude for protection of depositors is exemplified by the recent passage of the law insuring public deposits.[4]

The receiver filed suits at law side to recover on the several indemnity bonds. The surety company proceeded in equity praying cancellation of the bonds. All actions were tried on evidence be-

[3] See, Easton *v.* Iowa, 188 U. S. 220, 238.
[4] 12 U. S. C. Sec. 264 *et seq.*

fore a master and auditor "under a stipulation that findings of fact shall be final." These findings set forth all of the rights of the receiver as the representative of the creditors, the stockholders and the bank.

In this case, the principles involved are of great importance. The decree below adjudged the indemnity bonds to be void and unenforceable. Since I believe the receiver was entitled under these actions to enforce the bonds and to protect the innocent victims of fraud, I would reverse the decree below.

Mr. Justice REED concurs in this opinion.